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No. 403

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM T. LOESCH, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Constitutional provision involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Jencks v. *United States*, 353 U. S. 657 5

Reilly v. *Pinkus*, 338 U. S. 269 5

Constitution:

Fifth Amendment 2

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 11–15) is reported at 257 F. 2d 882.

JURISDICTION

The judgment of the court of appeals (Pet. 15–16) was entered on June 30, 1958, and the petition for a writ of certiorari was filed on September 25, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below correctly held that the examiner had not abused his discretion, or prejudiced petitioner, by certain rulings made during cross-examination of the Government's witnesses.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

STATEMENT

After full administrative proceedings, the Federal Trade Commission found that petitioner, a manufacturer and seller of hair remedies, had made false and misleading advertising claims that his preparation would kill bacteria beneath the scalp, eliminate dandruff, cure all local scalp diseases, stop excessive hair fall, prevent all types of baldness, and induce new hair to grow and old hair to become thicker. The Commission entered a cease-and-desist order, which the court of appeals unanimously affirmed. As in the court below, petitioner here contends only that the examiner erred in certain rulings made in connection with the cross-examination of two of the Government's expert witnesses.

At the hearing, the Government presented testimony by three medical experts to establish that petitioner's advertising claims were false. The first expert, Dr. Behrman, testified in New York City on September 13, 1955 (Pet. 12). At the conclusion of his testimony, the hearings were recessed until September 15 to give Government counsel a day to confer with its two medical experts in Chicago before the hearings were resumed there (*ibid.*). At the Chicago hearing the second expert, Dr. Rostenberg, stated on cross-examination that he had spoken to Government

counsel prior to testifying, and Government counsel so conceded (*ibid.*). However, Dr. Rostenberg denied that Government counsel had told him that Dr. Behrman "gave a very similar classification" of kinds of baldness, since "we didn't go into any explicit testimony that Dr. Behrman did give" (App. 44a[1]). He further stated that Government counsel "did ask me some of the questions he asked me today on direct, and got my answer," and that "[m]aybe in one or two cases" he told Dr. Rostenberg "what Dr. Behrman testified to," but "certainly not in this case, because it wouldn't interest me what Dr. Behrman testified to. I would give what I consider a proper classification" (App. 45a). At this point, the examiner criticized petitioner's counsel for "intimating" that Government counsel "told him what Dr. Behrman testified, so he testified the same" (*ibid.*), and petitioner's counsel did not pursue the line of questioning any further.

The next day, during cross-examination of the third Government expert, petitioner's counsel asked the examiner: "Could the record show that the question would be overruled if I asked who the doctor talked with in preparation for this hearing?" (App. 46a). The examiner replied (*ibid.*) that "[n]o. I have no objection to the doctor testifying as to whether he talked with Mr. Callaway [Government counsel] before he took the stand," but that his ruling "would be the same" as that of yesterday "on that type of question."

[1] "App." refers to the appendix to petitioner's brief in the court of appeals.

In unanimously sustaining the Commission's order, the court of appeals pointed out (Pet. 15) that the "scope and extent of cross-examination is ordinarily within the discretion of the court or examiner"; and it ruled (*ibid.*) that "no prejudicial or arbitrary exercise of that discretion has been shown," and "certainly nothing resembling denial of due process appears." The court pointed out (Pet. 13) that the examiner "in fact permitted" "[e]xtensive cross-examination of each of the three Government experts on the subject of the direct testimony"; that "[f]urther cross-examination to elicit whether the witness had, in the interview with the Government's counsel or on other occasions, expressed views in conflict with his direct testimony, was not specifically precluded" (*ibid.*); and that the examiner's criticism of petitioner's counsel "pertained to a minor incident in a vigorously contested trial, which had no material effect and could not have prejudiced" petitioner's case (Pet. 14).

ARGUMENT

The court of appeals correctly held (Pet. 15) that there was "no prejudicial or arbitrary exercise" of the examiner's broad discretion to determine the "scope and extent of cross-examination." As the court pointed out (Pet. 13), the examiner permitted "[e]xtensive cross-examination of each of the three Government experts on the subject of the direct testimony."[2] He allowed counsel to cross-examine the

[2] The cross-examination of the three witnesses occupies 232 pages of the transcript, as against direct examination of 80 pages (Tr. 150–463).

witnesses with respect to their prior discussions with Government counsel and, as the Court noted (*ibid.*), "[f]urther cross-examination to elicit whether the witness had, at the interview with the Government's counsel or on other occasions, expressed views in conflict with his direct testimony, was not specifically precluded" by the examiner's ruling.

In these circumstances, we submit that the examiner did not abuse his discretion in limiting further cross-examination with respect to a collateral issue bearing on credibility; that petitioner was not prejudiced thereby; and that certainly nothing resembling denial of due process appears. "The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency." *Reilly* v. *Pinkus*, 338 U. S. 269, 276.

Petitioner's contention (Pet. 3, 6–9) that the decision below conflicts with *Jencks* v. *United States*, 353 U. S. 657, is without merit. *Jencks* dealt only with a defendant's right in a criminal case to obtain documents in the Government's possession which he might use in cross-examination. In the instant case, however, there is no question of production of documents. The only issue is the scope of cross-examination, and the *Jencks* doctrine is not involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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